BOOK REVIEWS.

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THE DISTINCTIONS AND ANOMALIES ARISING OUT OF THE EQUITABLE DOCTRINE OF THE LEGAL ESTATE. By R. M. P. WILLOUGHBY, LL. D., Cambridge, England: THE UNIVERSITY PRESS. 1912. pp. xx, 113.

This book was prepared as a thesis for the degree of Doctor of Laws in the University of London, and comprises a brief examination of the legal relations existing between the equitable claimant to property and the holder of the legal title. A very large part of the thesis is devoted to an explanation and exaltation of the English doctrine of tacking incumbrances. While American courts have never followed this anomalous doctrine, the book will nevertheless prove interesting to American students of the English law of trusts, on account of its exposition of the peculiar application and limitations of this doctrine. There are chapters also on "the differentiation" of the legal from the "equitable estate," on "The plea of *bona fide* purchaser" and on "Possession *in personam.*" The book is extremely interesting as a collection and arrangement within small compass of the important English decisions affecting the relations between the equitable claimant and the holder of a legal title. That it has thrown any new light upon this subject, or that following in the path of modern writers upon equity it has taken any steps toward rationalizing it, can hardly be conceded.

The chancellors who developed our modern equity system found the English common law system already highly developed, but in many respects defective. Equity did not, as is sometimes said, set up a conflicting system of law in which it contested the existence of settled legal rights. Recognizing those rights, it insisted that the holder of them, if he acquired them or retained them unconscientiously, or if he used them unconscientiously when acquired, should be subjected to the decree of the Chancellor *"in personam,"* and that such decree should be framed in such manner as to render complete justice in accordance with the principles of equity. This is practically the whole content of the law of equity. Thus viewed, its system is simple and intelligible. It was not to be expected that any legal system could develop during the 15th or 16th centuries without becoming encrusted, to some extent at least, with the formalism and archaisms of the period, and this is true in a measure of our equity system. The effect of this tendency, however, is more apparent than real. We find this tendency in the phraseology and at times in the attitude of the chancellors rather than in the vital principles of the equity system as it actually exists. It is thus not only entirely capable of being rationalized, but it invites such treatment by legal scholars and writers more than any other branch of English jurisprudence.

The writer of this thesis has apparently been little influenced by these considerations. A reader unfamiliar with this subject would find it difficult to understand that the author was writing of the principles of a system of justice. His method of treatment is scholastic, not to say mediaeval. He sees in the equitable treatment of the legal estate the mysterious working of a system of legal mechanics, which, without rhyme or reason, produces certain legal results as blindly and inexorably as the workings of natural law. The following is an

example typical of many others: the author, in speaking of the doctrine of tacking, says: "The theoretical position seems to be that the equity advanced to interfere with the legal estate is met and neutralized by the plea of *bona fide* purchaser; the impact has been taken by the shield and its momentum is gone. The game of chess will supply another illustration. The defendant's king, the legal estate, is checked, that is, has become subject to the jurisdiction of the court, when he is threatened by the plaintiff's piece, an equity which will give that jurisdiction. But if the defendant should play skillfully he will have ready to guard his king another piece—another interest in the same property, purchased for valuable consideration without notice. As equity will not disarm him of his shield, this other piece is effective, and the king, the legal estate, is left free. The equities are equal in this sense, that one has been effective to neutralize the other." Such treatment cannot be an aid to the simplification or the rationalizing of a legal system. One turns from it to the admirable clearness and simplicity of such expositions of the law of equity, as for example, Maitland's Lectures on Equity, or Professor Ames' numerous writings on this subject, with the wish that the author might have founded his investigation on the rational basis established by that school of legal thought.

The tendency of the author also to find evidences of an extension of his favorite doctrine, as for example, his chapter on tacking absolute estates, will not commend itself to American lawyers, nor indeed will it find support in the expressed attitude of English judges. His treatment, for example, of Bailey *v.* Barnes (1894) 1 Ch. 25, as "the modern instance supporting the application of the doctrine of tacking otherwise than as between incumbrances" seems not to be justified by the actual decision. In that case, the defendant, who had purchased an equity of redemption without notice of the plaintiff's equity, and had thereafter upon learning of the plaintiff's claim bought from the mortgagee, also an innocent purchaser, selling under his power of sale in the mortgage (pursuant to the Conveyancing Act of 1821, Section 21), was held to be entitled to the property free of prior equities. It is familiar learning that a purchaser with notice from one who has purchased without notice, acquires all the rights of the latter; that a mortgagee who is an innocent purchaser, cuts off all prior equities by a valid exercise of his power of sale. If these principles were not sufficient to dispose of the case without referring it to the questionable doctrine of tacking, resort might be had to the argument that the case was correctly decided upon the simple ground that the defendant was the innocent purchaser of an equity of redemption and was entitled to retain his interest against the claim of the plaintiff since he had acquired his interest without any inequitable conduct, and there was consequently no principle upon which equity could disturb the right which he had acquired.

The chapter on "Possession *in personam*" is interesting and important in that it points out in a scientific way the nature of the jurisdiction which the court of equity exercises in placing the equitable claimant in the possession of property.

Viewed as a whole, this book will excite both the interest and regrets of students of equity. It is an excellent collection of the examples of the archaic in phraseology and reasoning of the English courts of equity, which with an occasional exception, as in the anomalous doctrine of tacking, has produced little effect upon the actual

development of equity. The time has now come, however, in the scholarly treatment of this subject, to justify the results actually reached by substituting the better reasoning for the poorer.

Harlan F. Stone.

A COMPARATIVE STUDY OF THE LAW OF CORPORATIONS WITH PARTICULAR REFERENCE TO THE PROTECTION OF CREDITORS AND SHAREHOLDERS. By ARTHUR K. KUHN. New York: LONGMANS, GREEN & Co. Columbia University Studies in History, Economics and Public Law, Vol. xlix, No. 2. 1912. pp. 173.

This somewhat brief but distinctly valuable production was intended, says the author in his modest preface, "as an humble contribution to the work of legislative research now being conducted at Columbia University under the auspices of the Legislative Drafting Association." It admirably serves its purpose and affords an excellent, albeit too fleeting, insight into the vast treasures of an almost uncharted region,—"Comparative Company Law"—we may term it, for want of any better recognized terminology.

First are considered the divers group forms and corporate types in ancient times and during the Middle Ages. Next follows a reasonably adequate sketch of the genesis and the development of the private corporation for pecuniary profit, viewed as a type of business organization, in England and the New World. Then, the protection afforded to creditors and shareholders in regard to (1) the organization, (2) the operation, and (3) the dissolution of companies are consecutively considered. In each branch of the subject, the work first considers the existent situation as it is revealed in five typical countries of Continental Europe, namely, France, Germany, Italy, Spain and Switzerland; thereupon follows a discussion of legislation and reforms upon each particular subject in Great Britain and in this country. To cover comprehensively such a truly vast field would require many volumes. Nevertheless, in a work of very small compass, the author has succeeded in presenting in a quite satisfactory manner the leading points of interest, and, fearlessly indicating his approval or disapproval, has criticized and commented upon them—often at some length. The heterogeneous nature of our state statutes and the want of uniform or federal legislation make this comparative study not only enlightening but also extremely profitable.

The author spends little time in vain theorizing whether the "entity" involved in the corporate concept has a real existence or whether it exists only by virtue of dogmatic fiction, whether or not the corporation can have a real "collective will," whether or not Gierke and the late lamented Maitland erred in their analysis of the nature of a corporation. In a monograph of this kind these are problems which properly are left to one side. And, after all *cui bono?* Whether one theory or another is adopted, the practical results are identical. As shrewdly remarked by Mr. Gray in his splendid sketch, "The Nature and Sources of the Law" (pp. 53-4): "In short, whether the corporation is a fictitious entity, or whether it is a real entity with no real will, or whether, according to Gierke's theory, it is a real entity with a real will, seems to be a matter of no practical importance or interest." To which, we can but add our fervent Amen! Why quibble? Why misdirect the attention of the neophyte?